RECENT DECISIONS.

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ADVERSE POSSESSION—WHAT CONSTITUTES—NOTICE AS THE CONTROLLING FACTOR.—The plaintiff, owner of certain mines, sought to restrain the defendants, the owners of the surface, from interfering with its mining operations. The defendants claimed the mines by adverse possession. *Held,* the defendants' possession was only of the surface and did not include the mines. *Crowe Coal & Mining Co.* v. *Atkinson* (Kan. 1911) 116 Pac. 499. See Notes, p. 672.

ASSAULT AND BATTERY—SELF DEFENCE—DUTY TO RETREAT.—In a criminal prosecution for assault and battery in which the injury to the prosecuting witness was only slight, the defendant pleaded self-defence. The court charged the jury that "where one is assaulted, it is his first duty to retreat if he can." *State* v. *Brittingham* (Del. 1911) 80 Atl. 242.

It is universally agreed that the assailed may stand his ground and, if it become necessary, even kill his assailant when retreat would not diminish his danger, *State* v. *Peo* (Del. 1889) 9 Houston 488, or when he is within his dwelling, *People* v. *Lewis* (1897) 117 Cal. 186, or in its immediate vicinity, *Smith* v. *Commonwealth* (Ky. 1894) 26 S. W. 583, or perhaps anywhere on his own premises. *Beard* v. *U. S.* (1894) 158 U. S. 550; and see *Allen* v. *U. S.* (1896) 164 U. S. 492, 498. But when withdrawal was reasonably safe, the old common law doctrine was that the slayer must have "retreated to the wall" before killing, 4 Bl. Com., (Chase's ed.) 934, and this humane rule has been followed in some of the American jurisdictions. *Allen* v. *U. S. supra; State* v. *Brown* (Del. 1902) 4 Pennywill 120; *State* v. *Gentry* (1899) 125 N. C. 733; *State* v. *Summer* (1899) 55 S. C. 32. In the majority of our States, however, a man without fault need not retreat, but may stand his ground and, if necessary to preserve his life, kill his adversary, *State* v. *Hatch* (1896) 57 Kan. 420; *Hammond* v. *People* (1902) 199 Ill. 173; *Erwin* v. *State* (1876) 29 Oh. St. 186, some courts declaring frankly that the old rule is not suited to American conditions. *Runyan* v. *State* (1877) 57 Ind. 80. When no question of homicide is involved, the uninterrupted current of authority runs counter to the principal case. *State* v. *Sherman* (1899) 16 R. I. 631; *Gallagher* v. *State* (1859) 3 Minn. 270. The state is vitally interested in the preservation of human life, and so may demand that a man shall incur the dishonor of flight before he kill; but by no sound reasoning can the state's interests be extended so as to require flight simply to avoid conflict. Therefore, on principle also, the charge is erroneous.

CANCELLATION—FRAUD—MISREPRESENTATION OF INTENTION.—The vendee of real estate induced the sale by misrepresenting his intention to put certain improvements thereon. *Held,* the vendor may have the deed cancelled on the ground of fraud. *Adams* v. *Gillig* (1910) 199 N. Y. 314.

A promise made in good faith but failing of contractual obligation gives no cause of action. *Jorden* v. *Money* (1854) 5 H. L. C. 185; *Pine Mountain Co.* v. *Ford* (Ky. 1899) 50 S. W. 27. When, however,

the promise is made with no intention to perform, it is considered in some jurisdictions to be a misrepresentation of the then existing state of mind of the promisor. *Old Colony Trust Co.* v. *Dubuque etc. Co.* (1898) 89 Fed. 794. This, therefore, is a misrepresentation of a present fact, satisfying the definition of actual fraud, Kerr, Fraud and Mistake, 46, and affording an action for damages, *Clydesdale Bank* v. *Paton* L. R [1896] A. C. 381; *Ayres* v. *French* (1874) 41 Conn. 142, or equitable relief. *Chicago etc. R'y Co.* v. *Titterington* (1892) 84 Tex. 218; *Troxler* v. *Building Co.* (1904) 137 N. C. 51. There is also entertained the opposite view that such a promise is purely a future thing; that it involves no existing fact upon which fraud may be predicated; *People ex rel.* v. *Healy* (1889) 128 Ill. 9; *Long* v. *Woodman* (1870) 58 Me. 49; and that, therefore, if there be no remedy in contract, it can create no legal liability whatever. *Gallager* v. *Brunel* (N. Y. 1826) 6 Cow. 346. The court in the principal case, though recognizing that this is the law of its jurisdiction, *Gray* v. *Palmer* (N. Y. 1864) 2 Robt. 500; *Wilson* v. *Dean* (1878) 74 N. Y. 531; *cf. Benton* v. *Pratt* (N. Y. 1829) 2 Wend. 385, distinguished the earlier New York cases as involving promises to act in the future instead of statements of present intention; and reached the sound conclusion that a state of mind, though perhaps difficult to ascertain, does not differ from any other fact. *Edgington* v. *Fitzmaurice* (1885) L. R. 29 Ch. Div. 459. As a result, however, New York would now appear to be committed to the view that a promise made with no intention to perform may constitute actual fraud; for where the statement of intention is in promissory form the court's distinction seems too refined for practical application.

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—CONTEMPT PROCEEDINGS.—The defendant was tried for contempt for disobeying an injunction issued in a suit brought under a statute declaring the violation of liquor laws a public nuisance, and was discharged. The contempt proceedings having been annulled on *certiorari* and the cause remanded for trial, the defendant pleaded the constitutional exemption from double jeopardy. *Held,* the provision did not apply. *Jones* v. *Mould, District Judge, et al.* (Iowa 1911) 132 N. W. 45.

The constitutional provisions against double jeopardy apply to all offenses including misdemeanors. *Berkowitz* v. *U. S.* (1899) 93 Fed. 452; *Brink* v. *State* (1885) 18 Tex. App. 344. Criminal contempts are held to be in the nature of crimes, *Ex parte Kearney* (1822) 7 Wheat. 38, and may be pardoned as such by the executive. See 3 COLUMBIA LAW REVIEW 45, 348. It would seem, therefore, that the provisions against double jeopardy should apply to them although the contemnor cannot demand the constitutional rights of trial by jury, *State* v. *Shepherd* (1903) 177 Mo. 205, and of confrontation. *State* v. *Mitchell* (1892) 3 S. D. 223. The reasons underlying these exceptions is that the constitution should not be so interpreted as to decrease the power of courts to enforce obedience to their authority, *Cartwright's Case* (1873) 114 Mass. 230, 238; *Watson* v. *Williams* (1858) 36 Miss. 331, 341, a result which would follow if they could not deal summarily with contempts. On the other hand, the individual must be protected against the tyrannical exercise of this power, and since to allow the plea of former jeopardy would not seriously weaken the remedy of contempt process, the conclusion reached in the principal case seems unfortunate. It is not clear, however, that the con-

tempt was a criminal one. A proceeding by the state to abate a public nuisance is civil in character. *State* v. *Collins* (1901) 74 Vt. 43, and the people stand in the attitude of private suitors seeking a civil right or remedy. Hence the disobedience of an order granted in such proceedings is not so much a violation of the rights of the public as represented by their legal tribunals, as an invasion of their rights as private individuals. *People* v. *Court* (1886) 101 N. Y. 245, and it is unquestionable that the violation of an order granted for the benefit of an adverse party is a civil contempt. 10 COLUMBIA LAW REVIEW 771.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—STATUTORY INTERPRETATION.—The defendant was indicted under a statute making criminal the possession of materials unlawfully removed from a railroad track. *Held,* since the *mens rea* was not made an element of the offence, the act was unconstitutional. *Kilbourne* v. *State* (Ohio 1911) 95 N. E. 825.

The legislative power of the State to define crime is limited only by constitutional provisions, and a statute eliminating the common law necessity for the *mens rea* would seem to be susceptible to attack only as a denial of "due process." 11 COLUMBIA LAW REVIEW 82. *Cf. People* v. *West* (1887) 106 N. Y. 293. But the personal liberty guaranteed by the "due process" clause is subject to the police power of the State. So when an act, though done in good faith, endangers the public wellfare, the legislature may penalize it and cast upon the individual the burden of ascertaining its unlawful character. *State* v. *Shevlin-Carpenter Co.* (1906) 99 Minn. 159. Thus the *bona fide* sale of adulterated food and the possession of gambling instruments have been interdicted. *Comw.* v. *Waite* (Mass. 1865) 11 Allen 264; *Ford* v. *State* (1897) 85 Md. 465. But to justify a statute under the police power it must be reasonably adapted to the end in view. *Lochner* v. *New York* (1904) 198 U. S. 45; *Ex parte Young* (1907) 209 U. S. 123, 145; *Rideout* v. *Knox* (1889) 148 Mass. 361, 372. Applying this test to the statute in the principal case, even if it were intended to protect the travelling public by destroying the market for the stolen equipment, the result seems too remote and problematical to warrant infringement on individual liberty by punishing an act innocently done and in itself harmless, and for this reason it appears clearly unconstitutional. It is questionable, however, whether the statute was properly construed, for although it has often been declared that the criminal mind if not mentioned is not essential, *Comw.* v. *Boynton* (Mass. 1861) 2 Allen 168; *People* v. *West supra;* 10 COLUMBIA LAW REVIEW 73, the better rule of construction is that the legislature will not be presumed to have abrogated the common law conception of crime unless the language or the purpose of the act clearly shows this intent, *Comw.* v. *Minor* (1889) 88 Ky. 432; *U. S.* v. *Carll* (1881) 105 U. S. 611; *State* v. *Sweeten* (1898) 75 Mo. App. 127; Bishop, Statutory Crimes, §§ 352, 358; 7 COLUMBIA LAW REVIEW 59, and since a statute should be constitutionally construed whenever possible, the latter view, which was followed in earlier Ohio cases, *Birney* v. *State* (1837) 8 Oh. St. 230, should have been taken in this one, and the act should not have been interpreted as dispensing with the *mens rea.*

CONSTITUTIONAL LAW—SELF INCRIMINATION—RIGHT OF CORPORATE OFFICER TO WITHHOLD THE COMPANY'S BOOKS.—A corporation was ordered to produce its books before a grand jury, investigating the acts

of the defendant, the president of the corporation, who, having withheld them, was committed for contempt. *Held,* Mr. Justice McKenna dissenting, because of the visitorial power of the state over corporations, their books are in the nature of public documents and the defendant could not rightfully withhold them. *Wilson* v. *U. S.* (1911) 31 Sup. Ct. Rep. 538.

It seems that a corporation is to derive no protection from the third clause of the Fifth Amendment. As the privilege which it affords is strictly a personal one, the corporate officers can withhold neither oral testimony, *State* v. *Standard Oil Co.* (1909) 218 Mo. 1, 375, nor the company's books, *Hale* v. *Henkel* (1906) 201 U. S. 43, on the ground that such evidence would disclose its guilt. And, apparently, the corporation itself cannot invoke this privilege when called upon for its books. *U. S.* v. *Amer. Tobacco Co.* (1906) 146 Fed. 557; *In re Amer. Sugar Co.* (1910) 178 Fed. 109; *contra, Logan* v. *Penna. R. R. Co.* (1890) 132 Pa. 403. *Cf. Hale* v. *Henkel supra.* It would seem, therefore, that a corporation is not a "person" under this clause of the Constitution. Proskauer, Self Incrimination, 11 COLUMBIA LAW REVIEW 445. The principal case carries the idea of corporate control still further by a radical extension of the definition of "public documents," to which the Amendment is declared inapplicable. *State ex rel.* v. *Donovan* (1901) 10 N. D. 205. *Cf. State* v. *Pence* (1909) 173 Ind. 90. It is not clear, however, that the visitorial power of the State governments over corporations to see if their franchises have been abused, is a satisfactory basis for assimilating corporate books to the status of public documents during an investigation of an individual's actions by the federal government. A similar decision was largely based on the ground that the corporate officer was not the legal custodian of the corporate books, *Ex parte Hedden* (1907) 29 Nev. 352, but there is no authority for an exception based on title to, or the right to possession of, the documents containing the evidence. *Cf. McGinnis* v. *State* (1865) 24 Ind. 500. It is submitted, therefore, that the decision under consideration finds justification only in the expediency of restricting the application of the Amendment. *Ex parte Chapman* (1907) 153 Fed. 371. See Proskauer, Self Incrimination, *supra;* Wigmore, Nemo Tenetur Seipsum Prodere, 5 Harv. L. Rev. 71.

CONTRACTS—ANTICIPATORY BREACH—STATUTE OF LIMITATIONS.—The plaintiff sued on a promise of the defendant's testatrix, made in consideration of the plaintiff's promise to care for the testatrix during her life, to pay the plaintiff a certain sum on her death. More than six years before her death the testatrix left the plaintiff with the intention of breaking the contract. The plaintiff continually held herself in readiness to perform. *Held,* the action was not barred. *Ga Nun* v. *Sands* (N. Y. Ct. of App. 1911), not yet reported.

It was generally recognized, before the rule of anticipatory breach was announced in *Hochster* v. *De la Tour* (1853) 2 E. & B. 678, that the breach of a promise to make testamentary provision for the promisee arose only on the death of the promisor. See *Quackenbush* v. *Ehle* (N. Y. 1849) 5 Barb. 469; *Patterson* v. *Patterson* (N. Y. 1816) 13 Johns. 379. In adopting that anomalous doctrine, see 4 COLUMBIA LAW REVIEW 64, the courts did not advance in point of time the right of action on the contract, but expressly gave the party not in default an election either to sue at once or, while awaiting the time for performance, to treat the contract as subsisting. See *Hochster* v. *De la*

Tour supra; Frost v. *Knight* (1872) L. R. 7 Ex. 111; 2 COLUMBIA LAW REVIEW 416. Therefore no cause of action accrues until the promisee exercises his option; *Foss-Schneider Brewing Co.* v. *Bullock* (1893) 59 Fed. 83; and if the Statute begins to run at the time of the defendant's repudiation of the contract, regardless of the plaintiff's choice, there can be no true option. A few jurisdictions, however, in similar cases where by contract the creditor has an election to declare the entire debt due on failure to pay one installment, have held that the Statute operates automatically on the debtor's default. *Hemp* v. *Garland* (1843) 4 Q. B. 519; *cf. Machine Works* v. *Reigor* (1885) 64 Tex. 89; *Nat. Bank* v. *Peck* (1871) 8 Kan. 660. This nullifies an option for which the plaintiff has contracted and is a result much less desirable than that reached in the principal case, which gives full effect to the choice offered the plaintiff by the doctrine of anticipatory breach. See *Heery* v. *Reed* (1909) 80 Kan. 380.

CONTRACTS—BREACH OF PROMISE TO MARRY—DEFENSES.—In an action for breach of promise to marry, the defendant alleged, *inter alia,* that after her promise she learned that the reputation of the plaintiff was bad, and that he had obtained money under false pretenses. *Held,* the defense was good. *Gross* v. *Hochstim* (1911) 130 N. Y. Supp. 315.

The failure to disclose certain facts, such as previous unchastity, constitutes fraud and makes the contract to marry voidable. The presumption, however, is that inquiries have been made and past misconduct waived. See *Sprague* v. *Craig* (1869) 51 Ill. 288. But as no fraud is alleged in the principal case, an inquiry must be made as to what defenses are valid in such an action. Unchastity, though buried under years of virtue, *Bench v. Merrick* (1844) 1 Carr. & K. 462; *Bell* v. *Eaton* (1867) 28 Ind. 468, is everywhere accepted as an absolute bar to the suit, *Von Storch* v. *Griffin* (1875) 77 Pa. 504; see *Colburn* v. *Marble* (1907) 196 Mass. 376, unless the plaintiff knew of it before promising. *Irving* v. *Greenwood* (1824) 1 Carr. & P. 350. Extreme views exist that this is the only perfect defense, *Baker* v. *Cartwright* (1861) 10 C. B. [N. S.] 123, see *Beachey* v. *Brown* (1860) 1 E. B. & E. 796, and that impossibility of performance alone is a sufficient answer. *Smith* v. *Compton* (1902) 67 N. J. L. 548. Aside from fraud and unchastity, the authorities are divided as to what will excuse performance. The previous insanity of the plaintiff will not do so. *Baker* v. *Cartwright supra.* Nor will the taint of negro blood in the plaintiff's veins. *Van Houten* v. *Morse* (1894) 162 Mass. 414. Immodesty and indecent actions are not a valid defense. *Colburn* v. *Marble supra.* On the other hand, a brutal and violent manner, *Leeds* v. *Cook* (1803) 4 Esp. 256; Eversley, Domestic Relations, (2nd ed.) 119, dishonesty in pecuniary affairs, *Baddeley* v. *Mortlock* (1816) 1 Holt 151, general bad character, *Foulkes* v. *Sellway* (1800) 3 Esp. 236; *Baddeley* v. *Mortlock supra,* the commission of a crime, *Sprague* v. *Craig supra,* and, in short, any misconduct that would necessarily tend to destroy the confidence essential to connubial happiness, *Berry* v. *Bakeman* (1857) 44 Me. 164, have been held to absolve the innocent one from the promise. Under this view the principal case was wisely decided.

CORPORATIONS—POWERS—RIGHT TO PURCHASE THE CORPORATE STOCK.—The plaintiff sought damages for the defendant company's refusal to perform a contract to repurchase certain shares of its stock which

the plaintiff had bought. The company contended that a contract to buy its stock was *ultra vires*. *Held*, the contract was valid. *Adam* v. *New England Investment Co.* (R. I. 1911) 80 Atl. 426.

The English courts have uniformly held that in the absence of statutory authorization corporations cannot purchase shares of their own stock. *In re London Bank* (1870) L. R. 5 Ch. App. 444; *Trevor* v. *Whitworth* (1887) L. R. 12 App. Cas. 409. This view has been followed in a few American jurisdictions. *Coppin* v. *Greenlees Co.* (1882) 38 Oh. St. 275; *Crandall* v. *Lincoln* (1884) 52 Conn. 73. The doctrine is occasionally based upon the theory that the corporate capital is a fund held in trust for creditors, *Crandall* v. *Lincoln supra*, but it is more often adopted because the courts fear that creditors or stockholders may otherwise be injured, *Trevor* v. *Whitworth supra*, or because they can find no ground in charters or statutes for implying a power which is neither incident to corporate existence nor necessarily included in the powers expressly granted. *Currier* v. *Lebanon Slate Co.* (1875) 56 N. H. 262; *Morgan* v. *Lewis* (1888) 46 Oh. St. 1. The trust fund theory has been discredited, see 3 COLUMBIA LAW REVIEW 303, 321, and the fear that to give corporations this power would be detrimental to creditors and stockholders has been obviated by the uniform refusal of the courts recognizing the existence of this right, to allow its exercise when the purchase results in fraud upon either of these classes. *Comm. Nat'l Bank* v. *Burch* (1890) 40 Ill. App. 505; *Price* v. *Pine Mountain Co.* (Ky. 1895) 32 S. W. 267. But the contention that there is generally no statutory authorization, express or implied, of such a power, has not been satisfactorily answered. Whether public policy demands that this power be given to corporations is a debatable question in the solution of which the security of stockholders and creditors must be contrasted with the convenience resulting to the corporations' fiscal arrangements.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—TIME OF ASSESSMENT OF DAMAGES.—The plaintiff brought an action to compel the defendant railway company to condemn land across which it had previously constructed its tracks. The State constitution provided that the compensation should be made "before possession is taken." *Held*, one judge dissenting, damages should be estimated as of the date of the commencement of the action. *Faulk* v. *Missouri etc. Ry. Co.* (S. D. 1911) 232 N. W. 233.

The rule that damages resulting from the exercise of the right of eminent domain should be estimated as of the date of the "taking" or the "appropriation" is generally accepted, but the authorities conflict in its application. Since the right of eminent domain is a prerogative of government not to be exercised by the individual until legislative enactment points out the occasions, the modes, the conditions and the agencies for its exercise, see *Allen* v. *Jones* (1874) 47 Ind. 438, it is clear that an owner's rights are not divested unless these provisions are complied with. *Hampden Paint Co.* v. *Springfield etc. Ry.* (1878) 124 Mass. 118. Accordingly, no legal appropriation occurs by merely obtaining possession of, or entering upon, private lands, *Lyon* v. *Green etc. Ry. Co.* (1877) 42 Wis. 538; *Texas etc. Ry. Co.* v. *Cave* (1891) 80 Tex. 137, although the owner makes no protest, *Chicago etc. Ry. Co.* v. *Randolph Co.* (1890) 103 Mo. 451, or gives his consent to this invasion of his property. *Leeds* v. *Camden etc. R. R. Co.* (1890) 53 N. J. L.

229. Therefore, if a statute provide that property must not be taken without compensation "being first paid," or that upon the filing of the oaths of commissioners the condemning party shall "become seised in fee," there is no appropriation until payment is made in the one case, *Ga. etc. Ry. Co.* v. *Small* (1891) 87 Ga. 355, or the commissioners' oaths are filed in the other. *Benedict* v. *City of New York* (1899) 98 Fed. 789. In like manner it would follow that under the constitutional provision in the principal case, the accepted rule of damages was correctly applied. But see *Daniels* v. *C., I. & N. Ry. Co.* (1875) 41 Iowa 52.

EQUITY—BILLS TO REDEEM—LACHES.—The plaintiff, remainderman under a mortgagor's will, sought to redeem property fourteen years after a foreclosure to which it was not made a party but of which it knew, and after the land had greatly increased in value and had been improved by the defendants. The period of limitations for the recovery of real property was ten years. *Held,* one judge dissenting, the plaintiff might redeem. *President and Trustees of T. A. & P. U.* v. *Keene et al.* (Ore. 1911) 117 Pac. 424.

It seems that the plaintiff's claim should have been barred by the rule that only conscience and reasonable diligence can demand the assistance of a court of equity. *Smith* v. *Clay* (1767) Ambler 645; *Hayward* v. *Bank* (1877) 96 U. S. 611. Though each court will exercise its discretion in deciding what is reasonable diligence, *Brown* v. *County of Buena Vista* (1877) 95 U. S. 157; *Bank* v. *Judy* (1896) 146 Ind. 322, generally Statutes of Limitations are followed by analogy, though equity is not bound to act in obedience to them. *Hall* v. *Law* (1880) 102 U. S. 461. Laches will ordinarily be a bar when the lapse of time has made it difficult to ascertain the truth, *Chase* v. *Winans* (1882) 59 Md. 475; *Harrison* v. *Gibson* (Va. 1873) 23 Gratt. 212, but it may also defeat a claim which would unquestionably have been good if urged in time. *Hendrickson* v. *Hendrickson* (1887) 42 N. J. Eq. 657; *Beckford* v. *Wade* (1809) 17 Ves. 87, 97. A delay of a comparatively short time is fatal to recovery if the defendant is prejudiced by the plaintiff's neglect to urge his claim, *Atty.-Gen.* v. *Delaware, etc. R. R. Co.* (1876) 27 N. J. Eq. 1, if the property involved is speculative in character, *Grymes* v. *Sanders* (1876) 93 U. S. 55, or if there has been a considerable change in its value. *Schlawig* v. *Purslow* (1894) 59 Fed. 848; *Catlin* v. *Green* (1890) 120 N. Y. 441. But a great lapse of time is in itself presumptively a bar, forcing the plaintiff to show that he was not guilty of laches. *Badger* v. *Badger* (1864) 2 Wall. 87; *Hammond* v. *Hopkins* (1892) 143 U. S. 224.

EVIDENCE—RES GESTAE—ADMISSIONS OF PRINCIPAL AS BINDING SURETY.—The defendant, when sued on its bond to indemnify the plaintiff against loss by an agent's embezzlement, objected to proof of the shortage by an accounting rendered by the agent long after the termination of his employment, but while it was still his duty under his contract to do so. *Held,* the evidence was admissible. *United American Fire Insurance Co.* v. *American Bonding Co.* (Wis. 1911) 131 N. W. 994.

The general rule is well established that the declarations of a principal are admissible as evidence against his surety only when they are part of the *res gestae,* with reference to which the surety has

covenanted. *Hatch* v. *Elkins* (1875) 65 N. Y. 489; *Ayer* v. *Getty* (1887) 46 Hun 287. Since hearsay evidence is not admissible, though a surety is bound by the acts of his principal, he is not bound by what the principal may afterward say he has done. *Trousdale* v. *Philips* (Tenn. 1852) 2 Swan 384; *Bocard* v. *State* (1881) 79 Ind. 270. The declarations of the principal are therefore competent evidence against the surety only when they are made during, and in explanation of, the performance of the duty for which the surety is responsible. *Lewis* v. *Lee County* (1882) 73 Ala. 148; *Shelby* v. *Governor* (Ind. 1829) 2 Blackf. 289. In the principal case it does not seem to be material, as against the surety, that the agent was bound by his contract to render an account, since that accounting was not had at such a time as to make it part of the *res gestae*. It is true that if the rendition of the account were part of the duty guaranteed by the surety, evidence concerning it would be admissible to prove a breach of the bond; *Father Matthew Society* v. *Fitzwilliam* (1882) 12 Mo. App. 445; *Townsend* v. *Everett* (1843) 4 Ala. 607; but even in this case it is doubtful that such evidence could be used to prove a previous embezzlement. *Cf. Bank* v. *Smith* (Mass. 1866) 12 Allen 243, 250. The rule with regard to *res gestae* has been correctly applied in another recent case. *Strobel and Wilken Co.* v. *Weisen* (1911) 128 N. Y. Supp. 798.

GARNISHMENT—JURISDICTION—SITUS OF DEBT.—The defendant, a resident of Missouri, was sued in Kansas, and a debt owing to him by a Missouri corporation doing business and amenable to process in Kansas, was sought to be attached there. *Held*, the Kansas court would take jurisdiction. *Sutton* v. *Heinzle et al.* (Kan. 1911) 115 Pac. 560.

Inasmuch as garnishment is a process operating *in rem, Ala., etc. R. R. Co.* v. *Chumley* (1890) 92 Ala. 317; *McBride* v. *Protection Ins. Co.* (1853) 22 Conn. 248; *Lewis* v. *Bush* (1883) 30 Minn. 244, so that the property sought to be sequestrated must be within the court's jurisdiction, there will naturally be found as many opinions as to what circumstances confer jurisdiction as there are theories of what determines the *situs* of a debt. Accordingly some courts hold that a debt is attachable only in the jurisdiction where it is payable. *Amer. Central Ins. Co.* v. *Hettler* (1893) 37 Neb. 849, while others insist that it is to be reached at the residence of the garnishee. *Bragg* v. *Gaynor* (1893) 85 Wis. 468. It seems that the confusion is to be accounted for by the fact that the *situs* of personal property is usually at the domicile of the owner. Story, Conflict of Laws, (8th ed.) § 362; *Thorne* v. *Watkins* (1750) 2 Ves. Sr. 35. As regards debts, however, although where such property is to be disposed of by direct operation of law, that of the owner's domicile will govern, yet it is said that properly speaking they have no *situs*. Story, Conflict of Laws, *ubi supra; Thorne* v. *Watkins supra*. It is clear, moreover, that in garnishment proceedings it is the obligation of the garnishee which is sought to be attached, *Harris* v. *Balk* (1905) 198 U. S. 215, and evidently wherever the garnishee might be sued by his immediate creditor, there that obligation exists. *Harris* v. *Balk supra*. Accordingly the weight of authority, see *Harris* v. *Balk supra*, with which the principal case is in accord, seems logically correct in holding that proceedings to sequestrate a debt are maintainable wherever the principal debtor could reach the garnishee by action. *Harris* v. *Balk supra; Mooney* v. *Union Pac. R. R. Co.* (1882) 60 Ia. 346.

HABEAS CORPUS—THE RIGHT OF APPEAL IN ABSENCE OF STATUTE.—A sheriff appealed from an order discharging a prisoner held for extradition on a criminal charge. *Held,* appeals do not lie from habeas corpus proceedings. *Wisener* v. *Burrell* (Okla. 1911) 115 Pac. 275.

At common law the proceedings of habeas corpus *ad subjiciendum* are not subject to review by a higher court. Brought to enforce the civil right of personal liberty, they are regarded as civil proceedings though the petitioner is held on a criminal charge. *Ex parte Tom Tong* (1883) 108 U. S. 556; *contra, Louisiana* v. *Judge of the Commercial Court* (1840) 15 La. Ann. 192. But though the writ of error exists as of right in civil cases under the common law, *Haines* v. *People* (1880) 97 Ill. 192, it can only be employed where the judgment is final and, although the conception is open to criticism, *Weston* v. *City Council* (1829) 2 Pet. 449, the order in habeas corpus has not generally been so regarded, *Hammond* v. *People* (1863) 32 Ill. 446; *contra, Yates* v. *People* (N. Y. 1810) 6 Johns. 337, for if remanded the prisoner may institute successive proceedings for his liberty, *In re Kopel* (1906) 148 Fed. 505; *In re Sneel* (1883) 31 Minn. 110; *contra, Ex parte Scott* (1875) 1 Dak. 146, or if discharged may be rearrested, *Ex parte Milburn* (1835) 9 Pet. 704. Some courts make an exception to this rule in the case of habeas corpus for the custody of children, and as this judgment is held final, *Bleakley* v. *Barclay* (1907) 75 Kan. 462; *Cormack* v. *Marshall* (1904) 211 Ill. 519, it may be reviewed. *Mahon* v. *People* (1905) 218 Ill. 171. The right of appeal, however, does not exist at common law, *Union Nat. Bank* v. *Barth* (1898) 74 Ill. 383, and so it has not been available in the case of habeas corpus unless provided by statute. *Carruth* v. *Taylor* (1898) 8 N. D. 166. *Cf. Ex parte Good* (1858) 19 Ark. 410. A number of States have so provided specifically, but the right does not seem to be given by a statute permitting appeals from "all final judgments." *Cf. Howe* v. *State* (1846) 9 Mo. 691. Since no right of appeal was given by statute in the principal case, the decision is in accord with the weight of authority and enhances the value of the writ.

HUSBAND AND WIFE—COMMUNITY PROPERTY—RELATIVE RIGHTS.—In an action for slander of title, it was shown that the property in dispute had been a community possession, and that the defendants were entitled as heirs to the entire interest possessed by the wife during coverture. *Held,* the defendants were owners of an undivided half interest. *Mazzei* v. *Gruis et al.* (La. 1911) 55 So. 555. See Notes, p. 668.

INSURANCE—FIRE POLICY—DIVISIBILITY.—The defendant in one policy insured for a single premium various items of the plaintiff's property for separate amounts. The policy provided that by a false answer to any question in the application the applicant should "forfeit *all* rights under the policy." *Held,* two judges dissenting, the policy was divisible and therefore void only as to the item misrepresented. *Benham* v. *Farmers Mut. Fire Ins. Co.* (Mich. 1911) 131 N. W. 37.

In many jurisdictions a fire policy insuring several items of property for separate amounts will be declared severable though a single premium is paid, Richards, Insurance Law, (3rd. ed.) § 115, and a clause providing that upon breach of a condition the "policy shall be void" is construed to nullify the policy only as to the property to which the condition pertains. *Mitchell* v. *Ins. Co.* (1894) 72 Miss. 53. *Contra, Southern Ins. Co.* v. *Knight* (1900) 111 Ga. 622; *Thomas* v.

Commercial Assur. Co. (1894) 162 Mass. 29. Assuming, however, that such a contract is divisible, it is nevertheless a single contract and if there be fraud as to any part, the whole will thereby be vitiated. *German Ins. Co.* v. *Read* (Ky. 1890) 13 S. W. 1080. This rule, furthermore, should not be applied if the properties insured are so related that a breach of condition as to part increases the risk upon the whole, for this would clearly run counter to the intention of the parties. *Ins. Co.* v. *Johnson* (1904) 69 Kan. 146; *Essex Bank* v. *Ins. Co.* (1889) 57 Conn. 335; *Baldwin v. Ins. Co.* (1880) 60 N. H. 422. *Cf. State Ins. Co.* v. *Schreck* (1889) 27 Neb. 527; *Taylor* v. *Ins. Co.* (1902) 116 Iowa 625. But it does not follow that an insurance company cannot condition its liability as to any part upon a strict compliance with each provision. So where the forfeiture clause reads that "the *entire* policy shall be void," the better view is that the contract is indivisible. *Germania Ins. Co.* v. *Schild* (1903) 69 Oh. St. 136; Richards, Insurance Law, (3rd. ed.) § 246. But see *Donley* v. *Ins. Co.* (1906) 184 N. Y. 107; 2 Cooley, Briefs on Insurance, 1914. It is submitted that the result should be the same where, as in the principal case, it is provided that any misrepresentation will cause a forfeiture of "*all* rights under the policy."

LIMITATION OF ACTIONS—BREACH OF TRUST—RIGHTS OF BENEFICIARY AFTER THE TRUSTEE IS BARRED.—After the Statute of Limitations had run against their trustee, the plaintiffs sought to have impressed with a trust property purchased by the defendants with notice that the plaintiffs were its beneficial owners. The plaintiffs were under legal disabilities at the time of the breach of trust. *Held,* the action would lie. *Elliott et al.* v. *Landis Machine Co. et al.* (Mo. 1911) 139 S. W. 356.

Since the only right of a *cestui que trust* is to compel the trustee to perform his duty, *Forde* v. *Haskins* (1615) 1 Rolle 125; *Norton* v. *Ray* (1885) 139 Mass. 230, if the Statute of Limitations has run against the trustee, the beneficiary also will ordinarily be barred, although he was not *sui juris* during the statutory period. *Wych* v. *E. I. Co.* (1734) 1 P. Wms. 309. But if a third party take the trust *res* with knowledge of the breach of trust, he cannot then plead the laches of the legal owner to bar the beneficiary, who has now acquired rights, independent of those of the trustee, against the stranger, *cf. Parker* v. *Hall* (Tenn. 1859) 2 Head 641, and these he may enforce either directly, *Rolfe* v. *Gregory* (1861) 11 Jur. [N. S.] 98, or through his trustee, *Wetmore* v. *Porter* (1883) 92 N. Y. 76. This principle is further illustrated by the *cestui's* right to follow the trust *res* in certain cases. *Jones* v. *Godwin* (S. C. 1858) 10 Rich. Eq. 226. And since the *cestuis que trustent* in the principal case were not *sui juris* upon the acquisition of these rights, the Statute did not begin to operate until their disabilities were removed. *Atty.-Gen.* v. *Magdalen College* (1854) 18 Beav. 223, 239. The decision is sound for another reason. The defendants became trustees *ex maleficio, Christy* v. *Sill* (1880) 95 Pa. 380, and as such should have no higher rights than the express trustees, *Rolfe* v. *Gregory supra,* in favor of whom the Statute will not run until the *cestui* knows of their breach of trust. *Hastie* v. *Aiken* (1880) 67 Ala. 316; *Russell* v. *Peyton* (1879) 4 Ill. App. 473. Since it did not appear that the plaintiffs had knowledge of the defendants' wrong during all of the statutory period, they should not have been barred, even had they been *sui juris* during that time. *Hoyle* v. *Jones* (1866) 35 Ga. 40.

MANDAMUS—PUBLIC RIGHT—CITIZEN AS PETITIONER.—The plaintiffs applied for a mandamus to compel the defendant to complete its road as required by its franchise. *Held,* one judge dissenting, the plaintiffs having no interest other than that of members of the public cannot appear as relators. *People ex rel. Karl et al.* v. *United Traction Co.* (1911) 130 N. Y. Supp. 477.

Where mandamus is sought to enforce a private right, only the person wronged can be the relator, High, Extraordinary Legal Remedies, (3rd. ed.) § 431, because mandamus is available only to the real party in interest. Therefore upon the application of the person interested mandamus will issue to enforce a duty to an individual though a public right is also involved. *Savannah Canal Co.* v. *Shuman* (1893) 91 Ga. 400. Where the sole object of the proceedings is the enforcement of a public right, the people are regarded as the real party in interest, and in some jurisdictions the action may be brought only by their official representative. *Sanger* v. *Commissioners* (1845) 25 Me. 291. However, since every citizen is interested in the performance of duties to the public, the right of an individual to appear as relator in such cases was early recognized and has been often affirmed. *People* v. *Collins* (N. Y. 1837) 19 Wend. 56; *People ex rel.* v. *Keating* (1901) 168 N. Y. 590; *County* v. *State* (1849) 11 Ill. 202; *Union Pac. Ry. Co.* v. *Hall* (1875) 91 U. S. 343. The argument that this doctrine permits a defendant to be harassed by many suits, see *Bobbett* v. *State* (1872) 10 Kan. 9, lacks force since the granting of the writ is discretionary and it may be assumed that it will not be unnecessarily granted. See *Union Pac. Ry. Co.* v. *Hall supra.* Where the duty is owed to the government as such, as opposed to the public at large, a valid limitation has been put upon the citizen's right to invoke mandamus, High, Extraordinary Legal Remedies, (3rd. ed.) § 430-*a,* but this restriction by the better rule does not extend to proceedings to compel a corporation, whether public, *In re Wheeler* (1908) 115 N. Y. Supp. 605, or private, *Loader* v. *Brooklyn R. R. Co.* (1895) 35 N. Y. Supp. 996, to comply with its franchise obligations if the duty is one in the performance of which the people have an interest. *Union Pac. Ry. Co.* v. *Hall supra;* but see *People ex rel.* v. *Interurban St. Ry. Co.* (1903) 83 N. Y. Supp. 622. While the decision may be supported upon another ground, see 2 Morawetz, Corporations, (2nd ed.) § 1136, the mere fact that the relators were interested only as members of the public is not sufficient.

MASTER AND SERVANT—TRESPASSING CHILDREN—LIABILITY OF MASTER FOR SERVANT'S NEGLIGENCE.—The plaintiff, a trespassing child of thirteen, was injured while obeying an unauthorized direction of defendant's servant to assist him by climbing upon a distilling vat. *Held,* the defendant was liable. *Wells* v. *Kentucky Distilleries & Warehouse Co. et al.* (Ky. 1911)) 138 S. W. 278.

He who is employed by an agent acting without authority is a mere volunteer; *Sparks* v. *East Tenn. etc. R'y Co.* (1888) 82 Ga. 156; *Nashville etc. R. R. Co.* v. *McDaniel* (Tenn. 1883) 12 Lea 386; *cf. Wischam* v. *Rickards* (1890) 136 Pa. 109; and no distinction should be made between adults and infants in establishing the relationship of master and servant, since capacity to estimate danger is here an irrelevant inquiry. *Flower* v. *Pa. R. R. Co.* (1871) 69 Pa. 210; *Werner* v. *Trautwein* (1901) 25 Tex. Civ. App. 608. In the principal

case, the court therefore relied on the theory of a master's duty to trespassing children, basing its decision on *Ky. R. R. Co.* v. *Gastineau's Adm'r* (1885) 83 Ky. 119. In that case, however, recovery was had under the doctrine of the turn-table cases independently of the unauthorized direction of the employee, the railroad yard being a place with dangerous and alluring machinery, *R. R.* v. *Stout* (1873) 17 Wall. 657, against which an owner must reasonably safeguard trespassing children. 2 COLUMBIA LAW REVIEW 564; 4 COLUMBIA LAW REVIEW 443. In the principal case, however, the vat was not dangerous and alluring and imposed no such duty. To hold the master responsible for the employee's negligence in directing the child to a position of danger, an act admittedly beyond the scope of his authority, *Driscoll* v. *Scanlon* (1896) 165 Mass. 348; *R. R. Co.* v. *Dial* (1893) 58 Ark. 318, is to enlarge unreasonably both the liability of a master for the negligence of his servant and the duty of a landowner toward trespassing infants; for it ignores the fact that the servant's direction is an intervening cause. *Cf.* 10 COLUMBIA LAW REVIEW 783. It is further to be noted that modern decisions tend to limit, *George* v. *Los Angeles R'y Co.* (1899) 126 Cal. 357; *Walsh* v. *Fitchburg R. R. Co.* (1895) 145 N. Y. 301, rather than to extend the doctrine of the turn-table cases. *R. R.* v. *Stout supra.*

MORTGAGES—ASSIGNMENT OF EQUITY OF REDEMPTION—EXTENT OF ASSIGNEE'S LIABILITY.—The plaintiff assigned to the defendant a contingent reversionary interest, "subject to a mortgage of £2000." The mortgagee having threatened to foreclose, the plaintiff sought to be indemnified by the assignee. *Held, inter alia,* the plaintiff could not recover because the defendant's interest was not vested and in possession. *Mills* v. *United Counties Bank* L. R. [1911] 1 Ch. 669.

Although the broad proposition that the purchaser of an equity of redemption is in conscience bound to indemnify his vendor against personal liability on the mortgage debt originated in *dictum, Waring* v. *Ward* (1802) 7 Ves. Jr. 332, it has been perpetuated by text-book writers of authority, 1 Jarman, Wills, (5th ed.) 644; 2 Story, Eq. Jur., (13th ed.) § 1248-*b* 2, and has been cited with approval. *Adair* v. *Carden* (1891) L. R. Ir. 469. It is true that where the assignee covenants to pay the mortgage debt he becomes liable to the mortgagor, if the latter is called upon to pay, or, in many jurisdictions, directly liable to the mortgagee, 10 COLUMBIA LAW REVIEW 765, and equity will impose such an obligation where the amount of the mortgage is deducted from the purchase price. See *Heid* v. *Vreeland* (1879) 30 N. J. Eq. 591; and see *Adair* v. *Carden supra.* But the mere recital that the property is subject to a mortgage will not have this effect. *Clifford* v. *Minor* (1899) 76 Minn. 12. It is submitted, however, that, although the property remains charged with the debt in the hands of the mortgagor's assignee, *Sweetzer* v. *Jones* (1862) 35 Vt. 317, it has never been decided that the purchase of an equity of redemption of itself gives rise to personal liability either directly or by way of indemnity. On the contrary the proposition has been repeatedly denied, *Shepherd* v. *May* (1885) 115 U. S. 505; see *Smith* v. *Truslow* (1881) 84 N. Y. 660, and since it does not clearly appear from the facts of the principal case as reported, that the purchase price was decreased by the amount of the mortgage debt, the decision is sound, but it would seem that the basis of the court's decision is an unnecessary limitation on an already sufficiently restricted rule.

MORTGAGES—EQUITABLE MORTGAGES—WHEN NO MORTGAGEABLE INTEREST EXISTS.—It was agreed orally between the parties that the plaintiff was to effect the purchase of certain land and to have a two-ninths interest therein although conveyance was to be made to the defendant who was to advance the purchase price and to deed to the plaintiff the latter's interest upon his repayment of a proportionate share of the cost. The plaintiff gave the defendant security for his performance. *Held,* one judge dissenting, no equitable mortgage was created because the plaintiff had no mortgageable interest in the land. *Bennett et al.* v. *Harrison et al.* (Minn. 1911) 132 N. W. 309.

Although it is established that where A has an interest, legal or equitable, in land owned by C, and B lends A the purchase price, taking a deed from C as security, equity will treat the transaction as a mortgage, *Carr* v. *Carr* (1873) 52 N. Y. 250, even though the agreement was an oral one, *Stitt* v. *Rat Portage Lumber Co.* (1905) 96 Minn. 27, there are *dicta* indicating that the result would be different if A had no such interest. See *Hall* v. *O'Connell* (1908) 52 Ore. 164; *Carr* v. *Carr supra.* Where resulting trusts have not been abolished, such an interest, if necessary, may be found in the trust implied in fact which springs from such a transaction. *Campbell* v. *Freeman* (1893) 99 Cal. 546. However, while at law "a man cannot grant that which he hath not," *Looker* v. *Peckwell* (1876) 38 N. J. L. 253, the necessity for some interest in order to create an equitable mortgage is not so apparent. Mortgages of after acquired property are uniformly recognized by courts of equity, *Pennock* v. *Coe* (1859) 23 How. 117; *Omaha etc. Ry. Co.* v. *Wabash etc. Ry. Co.* (1891) 108 Mo. 298, which make the intention of the parties, and not the existence of some interest, the controlling element. See *Mitchell* v. *Winslow* (1843) 2 Story 630, 644. It would seem, therefore, that if in the principal case the intention of the parties was that the defendant should hold the land solely as security for a loan made to the plaintiff, the latter acquired an equity of redemption therein immediately upon its conveyance, which the court would have been justified in enforcing. *Jones* v. *Gillett* (1909) 142 Iowa 506. Furthermore, there is authority for treating the defendant as a constructive trustee in such a case. See *Avery* v. *Stewart* (1904) 136 N. C. 427.

POWERS—POWER OF APPOINTMENT—EFFECT OF EXERCISE UPON APPOINTOR'S RELATION TO THE PROPERTY.—A domiciled Dutchwoman had a general power of appointment by will over property vested in English trustees, which she exercised in favor of her husband. Under Dutch law the husband could take but seven-eighths of the property. *Held,* the exercise of the power rendered the property assets of the appointor, and therefore subject to Dutch law. *In re Pryce* (1911) 58 L. J. Ch. Div. 525. See Notes, p. 663.

POWERS—SURVIVAL—POWERS COUPLED WITH AN INTEREST.—A husband, having conveyed real property to his wife for life with a power to devise the fee to one or more of the children, died before she made the appointment. *Held,* the power survived the donor's death. *Dixon* v. *Dixon* (Kan. 1911) 116 Pac. 886. See Notes, p. 661.

STATUTE OF FRAUDS—CONTRACT FOR THE SALE OF AN INTEREST IN LAND—CONTRACT TO PROCURE DEED FROM OWNER.—The defendants orally agreed for $600 to be paid to them to furnish to the plaintiff

a deed to land owned by another, in which the defendants had no interest. To an action on their promise the defendants pleaded the Statute of Frauds, which provides that any contract or sale of lands or any interest in or concerning them, must be in writing. *Held,* the contract was unenforceable. *Robertson* v. *Talley et al.* (Kansas 1911) 115 Pac. 640.

In determining whether or not a given contract is within the Statute of Frauds, its subject-matter must be the chief consideration. See *Heyn* v. *Phillips* (1868) 37 Cal. 529. So where one is to procure a conveyance of land to himself and then to transfer to another an interest therein, either legal or equitable, since the agreement is for the sale of an interest in land it is unenforceable if oral. *Dunphy* v. *Ryan* (1886) 116 U. S. 491; 11 COLUMBIA LAW REVIEW 386. If, on the other hand, by the contract one of the parties is merely to find a purchaser for the other's land, *Schmidt* v. *Beiseker* (1905) 14 N. D. 587, or to negotiate with the third party for the transfer of his land to that other, *Snyder* v. *Wolford* (1885) 33 Minn. 175, the contract is one of agency and is not covered by the Statute, but see *Allen* v. *Richard* (1884) 83 Mo. 55, even though the agent is to receive for his services a share of the profits accruing upon a resale by the principal, *Snyder* v. *Wolford supra,* or all that he can get for his employer's land above a certain sum. *Heyn* v. *Phillips supra.* This is not true, however, where the agent is to be compensated in land, for the subject-matter of the contract is then the sale of land by the principal to his agent. *Fuller* v. *Reed* (1870) 38 Cal. 99. It would seem, therefore, that the Statute contemplates only cases where the parties stand in the relation of vendor and vendee, having contracted with each other as principals, see *Carr* v. *Leavitt* (1884) 54 Mich. 540; Browne, Statute of Frauds, (5th ed.) 350, and that it deals only with undertakings affecting the title and conveyance of realty as between the contracting parties. *Schmidt* v. *Beiseker supra.* Under this view, the defense offered in the principal case was not a valid one. *Cf. Harben* v. *Congden* (Tenn. 1860) 1 Cold. 221; but see *Rawdon* v. *Dodge* (1879) 40 Mich. 697.

TENANCY IN COMMON—IMPROVEMENTS—COMPENSATION.—The defendant, tenant in common with the plaintiff, made improvements on the common property for which he demanded compensation. *Held,* on partition the defendant is entitled to have the improvements set apart to him, if it can be done in justice to his cotenant; otherwise he is entitled to compensation in the amount of the enhanced value of the land. *Burns* v. *Parker et al.* (Tex. 1911) 137 S. W. 705.

Though a tenant in common who puts improvements on the common property without the knowledge or consent of his cotenant has no legal rights with respect to those improvements, *Alleman* v. *Hawley* (1888) 117 Ind. 532, 538; see *Bearn* v. *Scroggin* (1882) 12 Ill. App. 321, 325, it is settled that a court with equity jurisdiction will, upon partition, allot to him the part improved by him if it can be done equitably. See *Elrod* v. *Keller* (1883) 89 Ind. 382; *Osborn* v. *Osborn* (1884) 62 Tex. 495. Where such a division is not possible, the courts are at variance on the question whether compensation should be allowed for improvements made honestly for the benefit of the premises, or not. The courts favoring the view which allows reimbursement and which is perhaps supported by the weight of authority, claim that it would be unjust to permit one tenant to be enriched by the

fruits of the other's thrift and enterprise. *Martindale* v. *Alexander* (1866) 26 Ind. 104; *Louvalle* v. *Menard* (1844) 6 Ill. 39. In accordance with this, the compensation given is not measured by the cost of the improvements, but by the value which they have imparted to the premises. *Moore* v. *Williamson* (S. C. 1858) 10 Rich. Eq. 323. In other jurisdictions it is held that no compensation should be allowed because anyone making improvements on the common property acts as a mere volunteer and should not be permitted to charge his cotenant for improvements which the latter may not desire. *Nelson's Heirs* v. *Clay's Heirs* (Ky. 1832) 7 T. J. Marshall 139; *Cosgriff* v. *Foss* (1897) 152 N. Y. 104. A result contrary to the decision of the principal case, which adopts the preferable rule, was reached in a recent New York decision. *Howard* v. *Morrissey* (1911) 130 N. Y. Supp. 322.

TORTS—INDUCING BREACH OF CONTRACT—ACTION BY PARTY COMMITTING BREACH.—The defendant, during a period of scarcity of ice, threatened to break its contract to supply the plaintiff with that commodity, if the plaintiff did not break its contract with a dairy company. The dairy company then bought of the defendant. *Held,* the defendant incurred tort liability to the plaintiff. *Sumwalt Ice Co.* v. *Knickerbocker Ice Co.* (Md. 1911) 80 Atl. 48.

Because the parties to a contract have a property right therein, *Raymond* v. *Yarrington* (1903) 96 Tex. 443, and because everyone has the right to the continuance of his business relations free from the unwarranted interference of another, *Quinn* v. *Leathem* L. R. [1901] App. Cas. 495; *Lucke* v. *Clothing Cutters* (1893) 77 Md. 397, to induce the breach of a contract without legal justification, *Knickerbocker* v. *Gardiner* (1908) 107 Md. 556, such as legitimate competition, *Mogul S. S. Co.* v. *MacGregor* (1899) L. R. 23 Q. B. 598, is a wrong actionable by him whose contract has been broken. *Jackson* v. *Morgan* (Ind. 1911) 94 N. E. 1021. It would seem immaterial whether the means employed by the defendant were lawful or unlawful, 8 COLUMBIA LAW REVIEW 496, and, if unlawful, whether fraud, physical force or intimidation, *So. Ry. Co.* v. *Machinists' Union* (1901) 111 Fed. 49; *Rice* v. *Manley* (1876) 66 N. Y. 82, or merely moral coercion. 8 COLUMBIA LAW REVIEW 496. The principal case, however, is the first example of recovery by the party induced to break the contract, but it is a sound application of the principles outlined above. Under normal trade conditions a contract action would have afforded the plaintiff all of its damages. But under the peculiar facts of this case disregard of the defendant's threats would have meant ruin, and it is exceedingly doubtful that it could have recovered for the loss of customers and good-will in an action *ex contractu.* See 1 Sutherland, Damages, (3rd ed.) §§ 45, 53. It seems manifest, therefore, that the threat of the defendant was equivalent to force, *Knickerbocker* v. *Gardiner supra; cf.* Smith, Issues in Labor Litigation, 20 Harv. L. Rev. 253, 268, and that the plaintiff itself was guilty of a breach of contract, would seem no reason for denying it a tort action for this unlawful invasion of its rights.

TORTS—JOINT TORT-FEASORS—CONTRIBUTION.—An action for personal injuries was brought against a telephone company and an electric light company. Upon recovery against the former it sought contribution from its co-defendant. *Held,* that unless the original plaintiff

could recover against the second defendant there could be no contribution; and that if the negligence of one defendant merely created a condition, which with the active negligence of the other caused the injury, the former was under no obligation to the latter. *Southwestern Tel. & Tel. Co.* v. *Sanders* (Tex. 1911) 138 S. W. 1181. See Notes, p. 667.

TORTS—NUISANCE—LIABILITY OF TENANT.—The plaintiff complained of a nuisance in the form of trees which overhung his land and which were on the premises when they were leased to the defendant. *Held,* a tenant is not liable for maintaining land in the condition in which he receives it. *Ackerman et al.* v. *Ellis* (N. J. 1911) 79 Atl. 883.

A grantee in fee incurs liability by maintaining a nuisance created prior to his acquisition of the land, *Lehan* v. *Cochran* (1901) 178 Mass. 566; 1 COLUMBIA LAW REVIEW 201, although in the case of a private nuisance it may first be necessary to request him to abate it. *Penruddock's Case* (1598) 5 Co. Rep. 101. This is because he who continues a nuisance is equally answerable with him who created it. A lessee having put himself in a position analogous to that of a grantee in fee by allowing the nuisance to remain after he learns of its existence and thus adopting it as appurtenant to the land, *W. & A. R. R. Co.* v. *Cox* (1894) 93 Ga. 561; *Irvine* v. *Wood* (1872) 51 N. Y. 224, must also answer for his continuance of the nuisance, either alone or jointly with his lessor. *Brogan* v. *Hanan* (N. Y. 1901) 55 App. Div. 92; *McPartland* v. *Thoms* (1889) 4 N. Y. Supp. 100. See *Ahern* v. *Steel* (1889) 115 N. Y. 203. In reaching a contrary and less desirable conclusion, the court in the principal case followed a *dictum* in *Meyer* v. *Harris* (1897) 61 N. J. L. 83, which is based on the theory that to require a lessee to abate a nuisance is to subject him to liability to his lessor for waste. This theory is at least doubtful. *Roswell* v. *Prior* (1702) 12 Mod. 635, 640. It is difficult to see how a tenant, acting under legal compulsion, can be subjected to liability for waste, for in such a case he would abate the nuisance as the agent of his landlord. Assuming the correctness of that doctrine, however, it seems to furnish no sufficient ground for exempting a tenant from responsibility for maintaining a nuisance, *City of Boston* v. *Worthington* (Mass. 1858) 10 Gray 496, a view which is supported by the weight of authority.

TRESPASS—RESPONSIBILITY OF LANDOWNER TO CHILDREN FOR ATTRACTIVE DANGERS ON PREMISES.—Children were wont to play in the lumber yard of the defendant where there was an unguarded moving chain, in which the plaintiff's intestate, an infant, was caught and killed. Except for danger signs no warning was given to the children. *Held,* the question of the defendant's negligence was properly submitted to the jury, and the lower court correctly refused to admit evidence of a warning of the danger to the child's father. *Nashville Lumber Co.* v. *Busbee* (Ark. 1911) 119 S. W. 301. See Notes, p. 665.

TRUSTS—SAVINGS BANK DEPOSITS—REVOCATION BY WILL.—The testator opened a savings account in his own name in trust for Mary Thomas, but by his will he bequeathed to her only the income of the fund for life. *Held,* the terms of the will should be executed. *Thomas* v. *Newburgh Savings Bank et al.* (1911) 130 N. Y. Supp. 810.

It seems to have been early considered that the mere deposit of

money in trust for another created an irrevocable trust at the time of the deposit. *Martin* v. *Funk* (1878) 75 N. Y. 134; *Robertson* v. *McCarty* (N. Y. 1900) 54 App. Div. 103; *Scott* v. *Harbeck* (N. Y. 1888) 49 Hun 292. This is perhaps still the rule in some jurisdictions, where, accordingly, when a deposit has been made in trust for another, the depositor is not allowed to use it for his own benefit. See *Sayre* v. *Weil* (1891) 94 Ala. 466. But the view has finally prevailed that such deposits are to be regarded either as "tentative trusts" merely, remaining fully in the depositor's control during his life, *Matter of Totten* (1904) 179 N. Y. 112; *People's Savings Bank* v. *Webb* (1899) 21 R. I. 218, unless he gives unequivocal manifestation of his intention to create a binding trust, *Farleigh* v. *Cadman* (1899) 159 N. Y. 169; *Matter of Davis* (N. Y. 1907) 119 App. Div. 35, or else as no trusts at all. See *Jewett* v. *Shattuck* (1878) 124 Mass. 590; *Stone* v. *Bishop* (1878) Fed. Cas. 13,482. It would seem, however, that the trust must arise, if at all, at the time of the deposit, subject merely to revocation, and that the sole effect of the death of the depositor who has not shown a contrary intention, is to raise a presumption that an irrevocable trust was intended; *Matter of Totten supra;* for no trust could arise from the mere fact of death. See *Beakes Dairy Co.* v. *Berns* (N. Y. 1908) 128 App. Div. 137. If a tentative trust is no trust at all, there is of course no difficulty in allowing the free disposition of the deposit by will. *Stone* v. *Bishop supra.* And if the first interpretation of a tentative trust is the sound one, the principal case would seem to follow it logically, since testamentary disposition may well be considered an effectual rebuttal of the presumption otherwise raised.

WATERS AND WATER COURSES—NAVIGABLE WATERS—RIPARIAN RIGHTS TO LAND UNDER WATER.—The plaintiff, a riparian owner on the Mississippi, brought ejectment for part of an island which had formed between low-water mark and the thread of the stream. The defendant claimed under conveyance from the State of Minnesota. *Held,* the plaintiff could recover. *Hall et al.* v. *Hobart* (C. C. A. 8th Cir. 1911) 186 Fed. 426.

Aside from the thirteen original States, title to the beds of navigable rivers is in the United States and passes to the States upon their admission. 9 COLUMBIA LAW REVIEW 738. The rights of riparian owners in such rivers differ in the various jurisdictions. *Shively* v. *Bowlby* (1894) 152 U. S. 1, 40; *So. Pac. Ry.* v. *Western Pac. Ry.* (1907) 151 Fed. 376, 390. In Minnesota the State holds the title to the bed in trust for the public, and the riparian owner has the usual exclusive rights of access to the navigable channel and of erecting structures for that purpose. Although such rights constitute property and are freely alienable, *Hanford* v. *St. Paul & Duluth Ry. Co.* (1889) 43 Minn. 104; *cf. Minneapolis Mill Co.* v. *St. Paul Water Commrs.* (1894) 56 Minn. 485, it seems clear that they are ordinarily but easements, *Taylor* v. *Commonweath* (1904) 102 Va. 759, and are not even as large as the rights embraced in the qualified title to the bed of the stream given by grace of the State in some jurisdictions. *Franzini* v. *Layland* (1903) 120 Wis. 72. That the scope of the riparian owner's right cannot be enlarged is proved by the fact that a custom under which such owners erect wharves is not available to support a contention that a city is thereby divested of its land, *Mobile* v. *Sullivan Timber Co.* (1904) 129 Fed. 298, and, *a fortiori,* is this

true when the title is in the State. Accordingly, as the State has the power to dispose of such submerged land, *Ill. Cent. Ry.* v. *Illinois* (1892) 146 U. S. 387, 435; *Weber* v. *Harbor Commrs.* (1873) 18 Wall. 57, a recovery in ejectment for the accretion to the bed seems an undue extension of the rights of riparian owners as against the State.

WILLS—CONSTRUCTION—POWERS OF THE COURT.—Real property was devised to trustees for four nieces, share and share alike to be settled on them and their children male and female at the age of 19; and "if after the marriage of any of these beneficiaries, a child is born and survives its mother, and then also dies leaving no issue, then the share it obtains from its mother shall revert to the living brothers, etc." *Held,* the nieces took a fee simple subject to be reduced to a life estate with remainder over to the children of such niece if she should marry and have issue, with other limitations by way of executory devises. *Phinizy* v. *Wallace* (Ga. 1911) 71 S. E. 896. See Notes, p. 670.